DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

ELP:jdh
Docket No: 7329-99
21 July 2000

[redacted]

Dear [redacted]

A three-member panel of the Board, sitting in executive session considered your application and a majority recommended that your naval record be corrected as set forth in the attached report dated 19 June 2000. In accordance with current regulations, the designated representative of the Assistant Secretary of the Navy for Manpower and Reserve Affairs conducted an independent review of the Board's proceedings and approved the minority recommendation that your application be denied.

You are advised that reconsideration of your case will be granted only upon the presentation of new and material evidence not previously considered by the Board and then, only upon the recommendation of the Board and approval by the Assistant Secretary.

It is regretted that a more favorable reply cannot be made.

Sincerely,

W. DEAN PFEIFFER
Executive Director

DEPARTMENT OF THE NAVY
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ELP
Docket No. 7329-99
19 June 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [redacted]

Ref: (a) 10 U.S.C.1552

Encl: (1) Case Summary
(2) Security Video Tape of 28 JUN 99
(3) Subject's Naval Record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the United States Navy, applied to this Board requesting, in effect, removal of a 23 August 1999 nonjudicial punishment (NJP) and promotion to AO2 (E-5).

2. The Board, consisting of Ms. Schnittman and Messrs. Bishop and Chapman, reviewed Petitioner's allegations of error and injustice on 31 May 2000 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner's application to the Board was filed in a timely manner.

c. Petitioner reenlisted in the Navy for four years on 21 January 1994 as an AOAN (E-3). At the time of her reenlistment, she had completed nearly four years of prior active service. Petitioner was advanced to AO3 (E-4) on 16 June 1996 and extended her enlistment for additional period of 19 months on 7 April 1998. The record reflects that this was her

second extension for an aggregate of 25 months. However, she acknowledged on this extension agreement that she could be discharged at her high year tenure date, 25 January 2000, if she was not advanced to AO2. Petitioner was frocked to AO2 on 11 June 1999 and the Board has been advised that she would have been advanced to AO2 on 16 December 1999.

d. On 30 June 1999, the Security Forces Squadron at Langley Air Force Base, VA reported to Petitioner's commanding officer (CO) that she was taken into custody at the base exchange (BX) on 28 June 1999 after she was observed removing a pair of Nike Air Jordan shoes from its box, putting them on her son's feet, and leaving the exchange without paying for them. An exchange security employee at the BX made the following statement:

> On 28 June at approximately 1638 hours, I received a call from the shoe department. I was informed that a black female, later identified as (Petitioner), was going to put on shoes before heading to the register. I then observed her and her young son as she was putting a new pair of Air Jordans onto his feet. She put his old shoes into the gray Nike Air Jordan box. When (Petitioner) walked away from the department, she did not have the gray box. Instead, she had a lavender colored shoe box. (Petitioner) browsed throughout the Mens' Department before approaching the front of the store. She walked to a table near the front entrance, set down the lavender shoe box, and then exited the exchange without rendering payment for the shoes on her son's feet. I then exited the office; once I detained her she had already reached the restrooms inside the lobby. I escorted her to the office and notified the SP's (security police). Her son needed to use the bathroom. At this point, (Petitioner) was willing to remove the new shoes from her son's feet and leave her purse in the office as I escorted her and her toddler to the customer service restroom inside the store. SP's later responded. Total amount of recovery is $29.95.

e. On 12 July 1999, a chief warrant officer (CWO4) from Petitioner's squadron reviewed enclosure (2) to determine whether Petitioner intended to steal the shoes. After this review, the CWO4 opined as follows:

> (Petitioner) was in full view of the security camera and was being shown changing her child's tennis shoes with a

new pair that were taken out of a silver colored box, possibly to try the proper fit on her son's feet.

Once both shoes were worn by her son and the old pair placed in the silver shoe box, (Petitioner) was viewed rising up from the floor, grabbing her son's hand, picking up another shoe box on the opposite side of her son (this box had a different color on the lid and walls) and departing the shoe sales area, leaving the silver box that now contained the old tennis shoes on the couch next to the place where her son was sitting.

(Petitioner) continued browsing for about 17 minutes throughout the clothing sections, still carrying the other shoe box, when she picked up her son and appeared to be heading towards the main entrance of the store. At this point she was viewed exiting the store without the shoe box and making a left turn just before reaching the main access doors to the complex. A few seconds elapsed when a woman was seen running out of the store and returning shortly after with (Petitioner) and her son. The elapsed time of the tape viewed was approximately 18 plus minutes. At no time during the viewing of the video tape did I observe (Petitioner) return the shoes that were taken out of the silver box back to the shoe area nor did she return to retrieve the box with the old shoes in it.

The CWO4 also stated that he then went to the BX to check the area and discovered that Petitioner took her son into a restroom located near a side exit. He also noted that after checking the area in the vicinity of the shoe department, he discovered an in-store restroom open to the customers. The CWO4 concluded the tape left a few unanswered questions that only Petitioner could answer.

f. On 13 July 1999, Petitioner made a statement to the effect that while in the exchange, she decided to get her son some tennis shoes. Since her son was so excited about the shoes she selected, she decided to leave them on and put his old shoes in the box with the intention of letting the cashier scan the box for the shoes he had on. She also selected a pair of shoes for her daughter and thought the box was cuffed under the same arm as her purse. After looking at the different clothes for men and children, her son told her he had to go the bathroom. Therefore, she gradually started walking toward the front of the store. By the time she was half way to the front of the store,

she realized that she didn't have the box with his shoes. She stated that it occurred to her that she could go back and pick up his other shoes; or drop her daughter's shoes off, take him to the bathroom and then return to pay for both of them. She decided to take her son to the bathroom, and then come back to purchase both pair of shoes. The reason she did not go back to get the box with his old shoes was because she was afraid he "would wet all over himself" considering the number of times he had told her he had to "go potty." She stated that she put the shoes for her daughter on the table located near the entrance to the BX. She claimed that she called her chief immediately after security let her go, but felt "blown off" when he said that the matter would be looked into the next day. Petitioner also stated that she had a good many things on her mind that day. Her three daughters had left for Texas with relatives and was wondering what time they would arrive, and the shoes were a treat for her son who could not go with the girls. She asserts that she would not jeopardize her career, her advancement to AO2 (E-5), or her chances to reenlist in the intelligence specialist (IS) rating over a $30 pair of shoes. She stated that before taking her son to the bathroom, she just returned two items for a refund and recently paid $202 on her credit account at the exchange. She complained that her chief and others in the chain of command were neither supportive nor wanted to hear what she had to say.

g. On 23 August 1999, Petitioner received nonjudicial punishment (NJP) for stealing the tennis shoes. Punishment imposed consisted of reduction in rate to AOAN, forfeitures of $637 per month for two months, and 45 days of extra duty. The following day, she appealed the NJP as being unjust and reiterated much of her earlier statement. She alleged that the CO told her that she "had her story rehearsed pretty good", and that she sounded sincere. She claimed that prior to being asked to wait in the passageway while the CO reviewed enclosure (2), he stated "you'll have time to think about telling the whole truth." She further claimed the CO also stated "all they needed to do was let you exit the store to the parking lot." She asserted that she did not realize that she was leaving the store and since the store's renovation, she was not aware of any bathroom other than the one she went to. While she admitted the security tape looked incriminating, she further asserted that she would not intentionally jeopardize her children's livelihood under any circumstances. She said that her husband was currently at sea on deployment and they were in the process of closing on a new house. He husband was responsible for paying

child support for two other children and the punishment placed an undue hardship in meeting the financial needs of their family.

h. On 2 September 1999, the CO endorsed Petitioner's appeal recommending that it be denied. He noted that she signed an acknowledgement of rights, reviewed the charge against her, and consulted with counsel prior to accepting NJP. He stated that guilt was established and punishment awarded based on the basis of irrefutable eyewitness testimony by exchange employees and the videotape record provided by enclosure (2). Documentation relating to bills paid and church donations were considered, but the CO believed they had no bearing on whether or not a person would commit this offense.

i. On 7 October 1999, Petitioner submitted an addendum to her appeal which included a report from a professional polygraph service which opined that she was not deceptive when she answered "No" to the questions "Did you steal those shoes?" and "Did you plan on keeping those shoes without paying for them?" Accordingly, Petitioner requested that the NJP be set aside. Alternatively, she asked that the punishment be reduced and she be reinstated to pay grade E-5, noting that she would otherwise be at high year tenure at the end of her enlistment.

j. On 7 September 1999 Petitioner requested assistance from her congresswoman. She stated that wanted an opportunity to tell her story to her superiors but they refused to believe her and prejudged her case before hearing all of the evidence, no one supported her, and her 10 years of outstanding service meant nothing. She said that, in retrospect, she should have refused NJP and elected trial by court-martial. She claimed that she was guilty only of taking her son to the wrong restroom.

k. On 8 October 1999 the appeal authority found that the CO did not abuse his discretion and the NJP was neither unjust nor disproportionate. Accordingly, her appeal was denied.

l. On 14 October 1999, the CO set aside that part of the punishment extending to forfeitures, but the reduction in rate and the extra duty remained in effect. He stated that the forfeitures were set aside to lessen the financial hardship placed upon Petitioner's family.

m. On 25 October 1999, the appeal authority responded to the congressional inquiry, in pertinent part, as follows:

> Immediately before her apprehension by an exchange security officer, (Petitioner) had been subjected to continuous surveillance and taping for a period of approximately seventeen minutes. A review of that tape reveals that (Petitioner) spent approximately five minutes fitting a pair of tennis shoes on her son, often times looking around the shoe department, as if to see if she was being watched. After she finished trying the new shoes on her son's feet, (Petitioner) placed his old shoes in the box that the new shoes had come in, placed the box on the bench and picked up another shoe box from the other side of the bench. She then left the shoe department and wandered through the exchange, browsing through various departments, for approximately ten minutes. As she neared the store entrance, (Petitioner) picked up her son, placed the shoebox she had been carrying on a display table near the entrance, and walked out of the main store area. Although (Petitioner) claims that she left the store because her son desperately needed to use the restroom, the physical manifestations one would expect from the typical three-year old cannot be observed on the videotape - despite the fact that (Petitioner's) son can be seen throughout the surveillance period.

The appeal authority noted that he had determined that the punishment awarded was not disproportionate under the circumstances, and pointed out that the CO subsequently set aside the forfeitures. He further noted that as result of the congressional inquiry, he caused Petitioner's case to be reviewed for a second time, and once again found the CO's action was within the bounds of the law and his discretion.

n. Petitioner was honorably discharged on 25 January 2000 by reason of non-retention on active duty, and assigned an RE-6 reenlistment code. Her final overall traits average was 3.57.

n. Petitioner provides a nine-page statement in support of her application which essentially reiterates her earlier arguments and statements. In support of her application, she provides 38 letters of reference which attest to her character and integrity, credit reports, Army-Air Force Exchange System credit card billing statements, share-savings statements, and

enlisted performance evaluations documenting above average to excellent performance.

o. Enclosure (2) was provided by the command and was viewed by the Board during it deliberations.

MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, the majority of the Board, consisting of Ms. Schnittman and Mr. Bishop, concludes that Petitioner's request warrants favorable action. In this regard, after reviewing enclosure (2), the majority wonders why BX security personnel focused in on Petitioner for such a long period when her behavior in the shoe department could not be described as suspicious. The statement of the security employee claimed that she was called by the shoe department and told that Petitioner "was going to put on shoes before heading to the register." The majority found it disturbing that the command never asked BX security personnel how the shoe department knew she was going to put on shoes before going to the register, why they then suspected she was going to shoplift the shoes, or whether she became a suspect because she resembled someone who had a prior history of shoplifting in the exchange. Petitioner does not indicate in any of her statements that she told anyone in the shoe department what she was going to do. The NJP evidence provided by the command contains no statement from the individual in the shoe department who apparently alerted exchange security.

The majority notes that only a preponderance of the evidence is required for a finding of guilt at NJP. However, the majority believes that Petitioner was apprehended before her intention to shoplift was clearly established. The evidence clearly shows that she took her son into a restroom located in a lobby area beyond the cash registers. While the restroom was outside the store area, it was still within the exchange facility. The majority also notes that enclosure (2) shows Petitioner setting the shoe box she was carrying on a display table before leaving the main store area. It is not known whether she left this box on the table because she knew that the lobby was considered outside of the store area, or because she needed her hands free to help her son in the restroom. The majority believes that Petitioner's intent could only have been clearly established had the security officer allowed her to leave the restroom and either return to the main store area or exit the facility.

The majority notes that Petitioner clearly had a lot on her mind at the time of the incident and, with a small child in tow, easily could have been distracted. Additionally, despite the appeal authority's contentions to the contrary, enclosure (2) reveals that Petitioner's son did display what could be construed as a need to go the bathroom, specifically, jumping and holding his hands in front of his groin area and tugging at his mother.

The majority also notes that Petitioner has presented nearly forty character references attesting to her integrity and submitted some of her financial records in an effort to show that she does not fit the profile of a shoplifter. Further, the majority believes the polygraph result tends to show that a miscarriage of justice has occurred. The majority finds it implausible that Petitioner, with 10 years of excellent to outstanding service, would jeopardize her career over a $30 pair of shoes when she had just been selected for advancement to AO2 and was getting ready to reenlist to further pursue her career as an intelligence specialist.

In sum, the majority does not believe that the command sufficiently investigated the incident prior to imposing NJP, thus leaving a number of unanswered questions to speculation. Further, Petitioner was apprehended before her true intentions were evident. Given the circumstances, the majority does not believe leaving the shopping area of the BX clearly established that she intended to steal the shoes. The majority believes given her otherwise good record she should be given the benefit of the doubt in this case. Accordingly, the majority concludes that it would be appropriate and just to remove the 23 August 1999 NJP from the record, thus restoring her to AO3. The record should also show that she was advanced to AO2 on 16 December 1999 and continued serve until she was involuntarily discharged with an RE-1 reenlistment code when her enlistment, as extended, expired on 20 February 2000. There is no basis for reinstating her to active duty since her enlistment contract has expired.

MAJORITY RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing all references to the NJP of 23 August 1999, including but not limited to the Court Memorandums (P601-7R) of 23 August and 14 October 1999.

b. That Petitioner's record be further corrected to show that she was not reduced from AO3 to AOAN on 23 August 1999 and that she was advanced to AO2 on 16 December 1999.

c. That the record be further corrected to show that Petitioner was involuntarily discharged as an AO2 on 20 February 2000 by reason of "completion of required active service" with an RE-1 reenlistment code, vice the reason for discharge and reenlistment code now of record.

d. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

e. That any material directed to be removed from Petitioner's naval record be returned to the Board together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross references being made a part of Petitioner's naval record.

MINORITY CONCLUSION:

Mr. [redacted] disagrees with the majority and concludes that Petitioner's request does not warrant favorable action. In this regard, the minority member's review of enclosure (2) reveals no evidence that Petitioner was distracted to the point that she would have inadvertently left the shoe box containing her son's old shoes in the shoe department. The minority notes that the security camera made a sweep of the shoe department area, and it appears there were no other customers in the area when she decided to leave the shoe department. The minority notes that when she left the shoe department, she had her purse over her shoulder and carried a lavender shoe box in her hand. The minority believed it would have been difficult for her to cuff two shoe boxes and a purse under her arm as she claims in her statement. Further, it was unlikely that she could carry two shoe boxes in one hand, and she should have realized when she left the shoe department that she did not have the other box. The minority also notes that although her son may have needed to go to the restroom, he did not appear to be overly stressed about it. The minority believes that by leaving the shoe box on the display table prior to leaving the main exchange area, she clearly demonstrated that she knew that unpaid merchandise was not allowed beyond that point. The minority further believes if she was really in a quandary, as she claimed, as to whether to

go back and get the box with her son's old shoes or risk the consequences of her son urinating before he got to the restroom, she could have advised a store employee of her problem. The minority is aware of Petitioner's overall record of service, the character references and other documents supporting her application, but concludes they are not sufficiently exculpatory to warrant removal of the NJP from her record. The minority believes that based on a preponderance of the evidence the CO did not abuse his discretion by imposing NJP. The minority further notes the CO mitigated the punishment by setting aside the forfeitures to lessen the financial burden on Petitioner's family.

In view of the foregoing, the minority finds no injustice warranting corrective action.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder

ALAN E. GOLDSMITH
Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.

W. DEAN PFEIFFER

~~MAJORITY REPORT:~~
~~Reviewed and Approved:~~

MINORITY REPORT:
Reviewed and Approved:

JUL 13 2000

C. L. Tompkins

CHARLES L. TOMPKINS
Deputy Assistant Secretary of the Navy
(Personnel Programs)